Supreme Court, U.S.
FILED

02 243 AUG 14 2002

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

In re Marriage of Caffrey

PATRICK R. CAFFREY,

Petitioner,

v.

DEBRA A. CAFFREY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

PATRICK R. CAFFREY,
Petitioner, pro se
P.O. Box 341
Seeley Lake, MT 59868
(406) 677-2661

175559

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

61 pp

QUESTION PRESENTED

Is the duty of parents to support their children also a protected liberty right?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	22

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Marriage Albinger, 2002 MT 104 (5/16/2002) 19

Bailey v. Alabama, 219 U.S. 219 (1911) 7

Bowen v. Gilliard, 483 U.S. 587 (1987) 7

Chamberlin v. Chamberlin, 185 Misc.2d 470, 713 N.Y.S.2d 646 (2000) 16

Coghill v. Coghill, 836 P.2d 921 (AK 1992) 11

Dunkin v. Boskey, 82 Cal.App.4th 171, 98 Cal.Rptr.2d 44 (2000) 15, 17

Elrod v. Burns, 427 U.S. 347 (1976) 11, 13

Ex Parte John Olyn Tabor, Jr, No. 1010043 (Ala. 6/7/2002) 17

Gall v. Gall, 187 Mont. 17, 608 P.2d 496 (1980) .. 18

Garrod v. Garrod, 590 N.E.2d 163 (IN 1992) 11

Georgia Dept. of Human Resources ex rel. Reddick o/b/o Sweat v. Sweat, Action No. 2000 C 127 (Sup. Ct. Atkinson Co., GA, 2/25/02) 9, 11, 12, 13

Cited Authorities

Page

Hoffman v. Hoffman, 805 S.W.2d 848 (TX 1991) .. 17

Holmes v. Wooley, 792 A.2d 1018 (DL 2001) 16

Huntley v. Huntley, No. E2000-01718-COA-R3-CV (Tenn.App. 6/14/2001) 17

In re Marriage Kummer, 2002 MT 168 (7/26/2002) 19

Lacy v. Arvin, No. 1498 (Md.Sp.App. 9/10/01) ... 17

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 6

Lehr v. Robertson, 463 U.S. 248 (1983) 8

Lemley v. Lemley, 102 Md. App. 266, 649 A.2d 1119 (1994) 10

Matter of O'Conner v. Curcio, 281 A.D.2d 100, 724 N.Y.S.2d 171 (N.Y.App.Div. 2001) 17

In re Marriage Oehlke, 2002 MT 79 (4/26/2002) .. 20

In re Marriage of O'Moore, 2002 MT 31 (2/28/2002) 20

People ex rel Cerda v. Walker, 32 P.3d 628 (CO 2001) 9

Cited Authorities

	Page
Prince v. Massachusetts, 321 U.S. 158 (1944)	5
Ridgway v. Ridgway, 454 U.S. 46 (1981)	7
Roe v. Wade, 410 U.S. 113 (1973)	11
Rose v. Rose, 481 U.S. 619 (1987)	13
Saenz v. Roe, 526 U.S. 489 (1999)	13
Santosky v. Kramer, 455 U.S. 745 (1982)	13, 14
Sharpe v. Sharpe, 902 P.2d 210 (WY 1995)	5, 18
Shoup v. Shoup, 37 Va.App. 240, 556.S.E.2d 783 (2001)	18
Stanley v. Illinois, 405 U.S. 645 (1972)	12
Troxel v. Granville, 530 U.S. 57 (2000)	3, 9, 13
United States v. Ballek, 170 F.3d 871 (9th Cir. 1999)	20
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	16
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	14

Cited Authorities

Page

In re Marriage of Widhalm, 279 Mont. 97, 926 P.2d 748 (1996) 3, 20, 21

Wilson v. Whitney, No. 23901 (Mo.App. S.D. 05/14/2002) 17

Winters v. Winters, 188 Mont. 43, 610 P.2d 1165 (1980) 19

In re Marriage of Woodford, 254 Mont.501, 839 P.2d 574 (1992) 20

Constitutional and Statutory Provisions:

U.S. Constitution 14th Amendment, Sec. 1 ..... 1, 21

U.S. Constitution Article 1, Sec. 10, cl. 1 14

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 1

42 U.S.C. § 667 1

42 U.S.C. § 1981 16

45 C.F.R. 302.56 1

Cited Authorities

	Page
28-3-202, MCA	20
40-4-201, MCA	1
40-4-201(5), MCA	21
40-4-204(3), MCA	1
40-4-204(3)(a), MCA	21
40-4-208(2), MCA	1, 18, 19, 21
40-4-208(2)(b), MCA	21
40-4-227, MCA	8
40-5-209, MCA	7
41-3-101, MCA	8
41-7-102, MCA	8
Rule:	
ARM 37.62.138	9

Cited Authorities

Page

Other Authorities:

Gay, Roger F., *The Constitutionality of Child Support Guidelines Debate, Part II*, Mens News Daily 5/22/02 10

Williams, Robert, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* (U.S. Dept. of Health and Human Services, Office of Child Support Enforcement, 1987 11

Representative Christopher Cox, *Press Release*, 7/16/2002 4

U.S. Census Bureau, *Child Support for Custodial Mothers and Fathers*, October 2000 5

VersusLaw web site 12

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Montana Decided April 11, 2002 ..... 1a

Appendix B — Order Of The Montana Fourth Judicial District Court For Missoula County Filed March 15, 2000 ..... 14a

Appendix C — Order Of The Supreme Court Of The State Of Montana Denying Petition For Rehearing Dated May 16, 2002 ..... 18a

Appendix D — Title 42 — The Public Health And Welfare 19a

Appendix E — Title 45 — Public Welfare Chapter III — Office Of Child Support Enforcement 21a

Appendix F — MCA. Child Support 24a

Appendix G — MCA. Child Support 25a

Appendix H — Constitution Of The United States Of America 26a

Appendix I — MCA. Separation Agreement 27a

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The order of the Montana Fourth Judicial District Court appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the highest state court decided this case was April 11, 2002. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on May 16, 2002, and a copy of the order denying rehearing appears at Appendix C.

The highest state court adversely decided a federal question.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

28 U.S.C. § 2403(b) may apply. This petition has been served on the Attorney General of the State of Montana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause and the Fourteenth Amendment of the U.S. Constitution are set out in Appendix H.

42 USC 667 is set out in Appendix D

45 CFR 302.56 is set out in Appendix E

40-4-204(3), MCA is set out in Appendix F

40-4-208(2), MCA is set out in Appendix G

40-4-201, MCA is set out in Appendix I

STATEMENT OF THE CASE

The Montana Fourth Judicial District Court issued a Decree of Dissolution on March 23, 1993 ordering the parties to perform their approved parenting plan. That agreement called for Debra to be primary residential custodian of their three children, but for Debra and Pat to otherwise share custody as parents of equal shared authority. It also stipulated alternative arrangements for child support. No monthly payments were ordered, as the parties would cover some support in their estate split, assume specified costs, manage their own assets, and cover emergent support needs by direct spending and in consultation according to their "respective abilities." Combined expenditures would be at or above the statutory need of $1167 per month.

On May 14, 1998 Debra filed for a support order.

Pat defended the contract's terms as considering the children's financial needs on an ongoing basis and continuing activities they enjoyed with both parents. Debra could invoke parenting team consultation anytime to review support arrangements. Documentation showed his expenditures on the children averaged $1250 per month, much of it for necessities and education. Pat's position was that the agreement was presumed to be a valid contract as a matter of State law and constitutional right.

Debra claimed Pat had not statutorily contributed to the support of the children, provided no necessities, spent extravagantly on nonessentials, she needed money, and she had a right to it as a matter of law. There was no documentation. Debra's position was that child support guidelines presume a correct amount as a matter of law.

The court reaffirmed the order in the Decree to adhere to the Agreement on June 19, 1998, then on March 14, 2000 ordered a monthly transfer payment to Debra of $1,022/month

and an arrearage of $17,374.[1] Implicit in the Order was that parents are compelled by presumption of harm to children to conform to statutory designations of obligor and obligee, with the entire support need placed under the control of one trustee.

In summary, there was no registered support order. Debra moved to establish one. The parties did not settle. The parenting plan was inadmissible contract per *In re Marriage of Widhalm*, 279 Mont. 97, 926 P.2d 748 (1996). Child support guidelines are presumed correct for setting and modifying decrees, including those with agreements. Direct support and voluntary payments made were ignored. Transfer payments were ordered "in the best interests of the children".

Pat appealed to the Montana Supreme Court, which affirmed the Order on April 11, 2002 and made two findings pertinent to this Court. 1. *Troxel v. Granville*, 530 U.S. 57 (2000) "dealt with a parent's rights regarding care, custody and control of children and not with child support obligations," and 2. "This Court's jurisprudence as set forth in *Widhalm* and similar cases which hold that parents may never contract with each other regarding child support and child custody, is consistent with United States Supreme Court jurisprudence and the Due Process Clause of the Fourteenth Amendment."

REASONS FOR GRANTING THE WRIT

Millions of Americans pay or rely on child support. Support determinations were federalized in 1989 by presumptive guidelines. Millions of Americans are also parties or beneficiaries to parenting agreements that are subject to federal protection as contracts. This Court has never addressed the constitutionality of either support determinations or parenting contracts, and the States have not been able to reconcile these conflicting mandates.

---

1. Pat is current on payments and has paid off the arrearage.

The liberty right to parent one's children has been clearly recognized by this Court, but an attendant right to support those children is neither enumerated nor recognized. Support is described at law only in a duty or obligation context, and is determined by guidelines established by the States but federally mandated to be presumptive. Because support is treated as a subordinate property interest, evidence can be disregarded if statutorily irrelevant or at odds per court discretion with a "best interests of the children" finding.

The resultant transfer payments, except for the impoverished, are excessive beyond the national interest in keeping families off welfare. Children are systematically deprived of their birthright to have their money spent as both their parents would determine without interference, and paying parents are often priced out of their children's lives. The federal government is sufficiently encroached into the process that States are no longer free to exercise remedial domestic relations and equity powers. Neither parents nor children have standing to seek redress, as without a right there is no remedy. The States can remove the profit motive from family law, but only if this Court clarifies the liberty interest involved.

Welfare rhetoric demonizing parents outside a household, regardless of whether they are genuinely disinterested or forced out, is *de facto* public policy. While many responsible fathers are stigmatized as "deadbeat dads", women are also disenfranchised, but without the recognition of a vilifying label.

10 million parents are behind on child support, with over $10 billion uncollected.[2] In 1997, 7 million parents were $12 billion in arrears. Fathers posted an arrearage deficit of 40%, and mothers 53%. Overlooked were a million custodial parents who didn't seek support because they didn't want their children

2. Representative Christopher Cox, *Press Release*, 7/16/2002.

to have contact with their other parents.[3] Those parents were denied a *right* to support their children, no relentless federal machinery came to their rescue, and many of their children were likely alienated from them and on public assistance.

Millions of our parents experience the American Dream as a gulag where their liberties are routinely ignored in statute and practice. They are stripped of parental authority in their children's presence, prohibited from pursuing logical career decisions, pre-empted from managing their own finances for the benefit of all involved, and demeaned by mandatory payroll withholding, sometimes even to underwriting alienation of their own children.[4] They are threatened with loss of credit, invasion of bank accounts, liens on property, loss of driver and professional licenses and passports, police harassment, and imprisonment for debt.

Even children and their custodial parents are degraded by a system that rewards opportunism with financial aggrandizement. Children see their parents more as slaves and parasites than as providers of solace, guidance and stability. The State cannot provide those things and cannot fix what it breaks. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Adversarial custody battles are waged using children as a shield from persecution by an Orwellian support enforcement engine. Those who insist government must protect children from hostilities between parents have created self-fulfilling prophecy.

---

3. U.S. Census Bureau, *Child Support for Custodial Mothers and Fathers*, October 2000.

4. *Sharpe v. Sharpe*, 902 P.2d 210 (WY 1995).

Child support determinations patronize parents while liquidating the present value of parent-child relationships for cash reallocation, applying standardized principles as the "best interests of children." "Far more precious than property rights, parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men." *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981).

In 1988, Congress stepped beyond a commerce and welfare interest in support enforcement and into determination of the awards. Congress avoided a direct enactment confrontation with the domestic relations exception by allowing States to elect participation in exchange for federal grants.[5] With annual grants averaging nine figures at stake, all States scrambled to take the offer.

The algebraic models offered to calculate support presume just and appropriate awards, but the presumption is rebuttable. Federal authorization for States to apply presumptive guidelines is in effect a self-delegated power to pre-approve State court judgements, giving both Congress and the States a unique form of plausible deniability. No matter what burden is imposed on parents to rebut guideline amounts, States can say the process is federally mandated and their hands are tied. Congress can say the States elected the program, domestic relations are their jurisdiction, faults in process are their responsibility.

With State child support policy co-opted under the national anti-poverty agenda, all children living outside of intact marriages of both natural parents became federalized wards as

---

5. States were required to adopt the Family Support Act of 1988 and meet IV-D requirements in order to receive funds under the Aid to Families with Dependent Children (AFDC) program. (TANF replaced AFDC in 1996.)

to support, and State collection agencies became brokerage houses on commission to facilitate transfer of wealth between parents.

"A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment." *Bailey v. Alabama*, 219 U.S. 219 (1911). "The Government has thus placed a burden on the child's fundamental interest in a relationship with both parents on the basis of a factor over which the child has no control." *Bowen v. Gilliard*, 483 U.S. 587, 625 (1987). "As a consequence of the Supremacy Clause, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

Support awards are now automated. Once data is processed, without human reasoning by parents or judges, the output is substantive law posturing as procedure.

In the federal mandate (Appendix D), Congress nationalized presumptive guidelines that had previously been advisory, and allowed for the presumption to be rebutted.

The implementing regulation (Appendix E) apparently was not revised until after the States agreed to abide by it. It stipulates a single set of guidelines for both establishing and modifying support awards, that States can establish criteria under which the presumption of a correct amount may be rebutted, and that the criteria must take into consideration the best interests of the child. Deviations have to be justified by the court. It then instructs the States to close loopholes to minimize deviations. The net effect is that guideline amounts essentially became minimums, allowing add-ons for a child's unique needs.[6]

---

6. Guidelines in Montana determine minimum amounts. 40-5-209, MCA.

Montana's revised statute (Appendix F) provides that its guidelines will be used in all cases, including modifications where parents previously agreed to support arrangements. The standard of review to rebut the guidelines in all cases is "clear and convincing evidence."

Since application of the "best interests of the child" standard is a matter of discretion, the scheme is flawed.

Nothing is *res judicata*. Court orders and parenting agreements, even if called contracts, are mere memorandums of intentions during dissolution. No threshold finding is necessary to alter them. All it takes is a disagreeable custodian to veto a decree or agreement by filing a motion and await the pre-determined outcome. The court in effect submits to the authority of the custodian, in opposition to State policy favoring both parents in the lives of children[7], doesn't verify benefits to children, and is not equal protection. "Statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child . . . it violated the Equal Protection Clause to grant the mother a veto . . . but not to grant a veto to their father." *Lehr v. Robertson*, 463 U.S. 248, 267 (1983).

The guidelines are not rebuttable. Social engineers and mathematical model makers created the technology, not parents. A clear basis for a just and appropriate award is not possible, so unjustness and inappropriateness cannot be demonstrated. The need for schedules to avoid insufficient support is compelling, and schedules tell parents what the State as a matter of policy expects them to spend. The problem is in how the obligation is shared. In order for the guidelines to work, parental time with the children must be compartmentalized, relying on

7. Montana policy regarding children is found at 40-4-227, 41-3-101 and 41-7-102, MCA.

clocks and calendars rather than parental prerogatives to determine a trustee for the child's money.[8] This inflicts a futile burden not found in a mandatory guideline, implying there is something to challenge in the model itself. A parent cannot prevail by clear and convincing evidence against a child's best interests and judicial discretion, as it can never be an abuse of discretion to presume a presumption is correct. The guidelines automatically make findings of fact and conclusions of law, so there is no context in which to consider evidence. Rules for imputing income are similarly exclusive.[9] The presumption admits awards may be excessive, but allows them for the sake of uniformity. "There are no baseline components to the Guidelines. It is not clear what is being rebutted, therefore they are arbitrary and a due process violation." *Georgia Dept. of Human Resources ex rel. Reddick o/b/o Sweat v. Sweat*, Action No. 2000 C 127 (Sup. Ct. Atkinson Co., GA, 2/25/02).[10]

Per *Troxel*, *supra*, application of the "child's best interest" standard of review by itself implies parental unfitness. Once invoked, parental funds are demoted to third party or property interest status, even where there are otherwise equivalent parental rights. Funding in family matters enables parental liberties and cannot be so distinguished. If, per *Troxel*, the standard is non-applicable between parents and non-parents

---

8. Statutory thresholds for sharing support between parents are often just beyond reach when a child lives with one parent to attend school. See Administrative Rules of Montana, ARM 37.62.138.

9. When a father moved to be closer to his children, going to a lower paying job, in support terms he was voluntarily underemployed and received no reduction in his obligation. *People ex rel. Cerda v. Walker*, 32 P.3d 628 (CO 2001).

10. No appellate decisions involving child support guidelines have been issued in Georgia since this ruling.

absent harm, then *a fortiori*, scrutiny when two fit parents compete should be heightened, not lowered. The preeminent best interest of children is that the parents who care for, keep and control them maintain independence and sovereignty. Otherwise, children will learn their parents don't have rights, and neither will they when they have children.

"The premise of the guidelines is that the goals of equity and consistency in child support awards are best served by stripping the court of most discretion." *Lemley v. Lemley*, 102 Md. App. 266, 649 A.2d 1119 (1994). When a court has the discretion of a calculator, a showing of changed circumstances or other statutory test is elective depending whether it is found to be in the child's interests. Appellate review of discretion need consider only facts relating to the child, not the parents.

Parenting expenses of the paying parent are not taken into account. A child support award funds two needs. The cost of living allowance (COLA) is a flat rate for basic necessities, health care and education. The remainder is a standard of living allowance (SOLA) intended to preserve the quality of life a child would enjoy had the parents remained together. COLA corresponds to federal welfare interests, while SOLA comes under a State's equity powers. The entire need is awarded to a designated custodian, along with the paying parent's decision-making authority, unless the paying parent has the requisite percentage of custodial days.[11] If a child has a right to a relationship with both parents, child support policy provides only half that right and discriminates against them by accident of divorce. The paying parent may have provided a parenting style the other parent cannot replicate, so the only way the paying

11. The model makers did not develop a credible method of crediting a paying parent's expenditures. See Gay, Roger F., *The Constitutionality of Child Support Guidelines Debate, Part II*, Men's News Daily 5/22/02.

parent can maintain a previous parenting style is to pay for it twice. A child's relationship with a parent can be much more satisfying if the emphasis is on is *quality*, rather than quantity of time. "The guidelines bear no relationship to the constitutional standards for child support of requiring each parent to have an equal duty in supporting the child . . . this violates equal protection standards for both the child and the non-custodial parent." *Sweat, supra.*

If a parent challenges the guidelines and the court's discretion, the challenges cancel each other. "Not knowing how a trial court will exercise its discretion does not make the guidelines unconstitutionally vague," and the guidelines provide equal protection because there is "no relevant or controlling authority" to cite. *Garrod v. Garrod*, 590 N.E. 2d 163 (IN 1992). See also *Coghill v. Coghill*, 836 P.2d 921 (AK 1992).

There is an overarching concern of assertion by rote of compelling government interest. "It is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests . . . encroachment cannot be justified upon a mere showing of a legitimate state interest," *Elrod v. Burns*, 427 U.S. 347, 362, 368 (1976), and it must be "narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113 (1973).

The federal goals for determining support awards are to increase their adequacy, consistency and predictability, compliance through perceived fairness, and ease of administration.[12]

---

12. Williams, Robert, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* (U.S. Dept. of Health and Human Services, Office of Child Support Enforcement, 1987.

Adequacy can be achieved, but it cannot be increased. "This Court finds that, by requiring the non-custodial parent to pay an amount in excess of those required to meet the child's basic needs, as the economic analysis has shown, the Guidelines impermissibly interfere with parental decisions regarding financial expenditures on children. *Troxel v. Granville.*" *Sweat, supra.*

Bureaucrats may wish for consistent and predictable awards, but children wish for consistent and predictable parents. Guidelines striving for uniformity can create a sense of entitlement that strains relations between parenting partners. Families need particularized treatment, not standardization. "The State cannot, consistently with due process requirements, merely presume that unmarried fathers in general, and petitioner, in particular, are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof." *Stanley v. Illinois*, 405 U.S. 645 (1972).

Compliance has suffered despite application of ever escalating enforcement efforts and mandatory payroll withholding. Appeals are not diminishing in spite of extensive case law.[13]

> (Ease of administration) is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency . . . the Bill of Rights in general, and the Due Process Clause in particular . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency.

Stanley, supra, 656.

---

13. As of 8/11/2002, there have been 3764 State court appeals since 1989 involving "child support guidelines", 815 of them involving a "rebuttable presumption" of some kind. 374 and 71 respectively were in 2001, 242 and 46 so far in 2002. *VersusLaw web site.*

States have a legitimate compelling interest in managing child support, and federal involvement may facilitate achievement of those purposes. However, presumptive guidelines as applied constitute an impermissibly restrictive means. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Elrod, supra*, 363.

"Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Saenz v. Roe*, 526 U.S. 489, 507 fn21 (1999).

The Montana Supreme Court distinguished *Troxel, supra* as not being on point for child support.[14] While *Troxel* dealt with grandparental visitation, no cases in *Troxel's* line of precedent did so.[15]

Troxel was not clear and convincing evidence that Pat had a liberty interest in maintaining his financial relationship with his children. When a support award constitutes the entire need of a child, support *is* custody, and can border on termination of parental rights. *Troxel* presumes fit parents act in the best interests of their children and don't have to prove it. A statutory presumption may not trump this Court's presumption without this Court's say-so.

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745 (1982).

---

14. Child support is a unique financial obligation. *Rose v. Rose*, 481 U.S. 619, 637-639 (1987).

15. However, *Troxel* has been cited in declaring child support guidelines unconstitutional. *See Sweat, supra*.

This Court recognizes the liberty embedded in the Contracts Clause (Appendix H) as a qualified right. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). A contract may be prohibited only in situations that admit no exceptions.

An obligation of care can suspend a contract, as no State allows a contract of any kind to harm a child. Most States hold that parents may contract child support, but may never contract away a child's right to it. The difference is absolute. One ensures and bestows the support right, the other impedes or renounces it.

Such contracts are usually subject to court review before approval, and parents may not bind a court to support terms or otherwise restrict a court's continuing jurisdiction.

Parenting agreements asserting both contract and parental rights are entitled strict scrutiny touching on abuse, neglect, dependency or loss to the child of an entitlement. A basis in discretion, best interests finding or presumptive determination is not sufficient. While a court is not bound to contract terms, it is bound by a presumption the contract is enforceable. In general, a contract should supercede a court's discretionary power when the children are receiving better than adequate care, as there are contempt and breach remedies. Presumptive guidelines have reversed this priority. "At the factfinding, the State cannot presume that a child and his parents are adversaries." *Santosky*, *supra*, 760.

A parenting contract is the least restrictive means of raising children outside marriage. Parents may mutually restructure parental prerogatives, assume rights and duties as a team, preserve liberties enjoyed while married, and keep family matters private.

States encourage and courts readily facilitate cooperative parenting agreements. When emotionally conflicted parents cooperate for the benefit of children, they merit heightened protection, barring specific factors that are or will inevitably harm children.

Every contract contains an implied covenant of good faith and fair dealing, which must be in the interests of children. When contract terms are non-binding, they covenant bad faith and unfair dealing.

When courts determine parents can no longer cooperate, application of the "best interests" standard will find the children have been adversely affected, and will inquire no further into parental motivations.

As parents may deviate from a contract, they should be held to their commitments if possible. Unfair terms they can easily amend are better than unfair orders they can't. Court power to destroy reliance on terms is a drastic act. It poisons trust, suspends parenting arrangements, distorts obligations, demolishes parental authority, eliminates cooperation, and unbalances the equity of interwoven terms. "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds." *Dunkin v. Boskey*, 82 Cal.App.4th 171, 98 Cal.Rptr. 2d 44 (2000).

Parenting contracts are unique in that a parent is not excused from an obligation if the other parent commits breach, and property cannot compensate for the loss of a relationship with children. Should the terms prove non-binding, affected parents and children have neither a right nor a remedy.

Contracts should not be prospectively impaired as at odds with public policy.

> Without running afoul of the constitutional prohibition against the impairment of contracts, the

> State must demonstrate that the impairment was essential to the achievement of an important state purpose. Furthermore, the State must show that it did not know and could not have known the impact of the contract on that state interest at the time that the contract was made.

United States Trust Co. v. New Jersey, 431 U.S. 1, 32 (1977).

Treatment of parenting contracts is inconsistent from State to State.[16] Some will enforce them, others say they are enforceable only *inter sese*, others that they are unenforceable, or that they are agreements, not contracts, and that only court orders are enforceable. Some States strike contract terms while others only modify decrees or terms referenced therein. Examples:

"A parent's contractual obligation for child support can be enforced at any time." *Holmes v. Wooley*, 792 A.2d 1018, 1023 (DL 2001).

Parenting plan modification without scrutiny is limited to subsistence (COLA) due to sanctity of contracts, modification with scrutiny for costs above COLA without regard for contract sanctity is allowed. *Chamberlin v. Chamberlin*, 185 Misc.2d 470, 474, 713 N.Y.S. 2d 646,649-650 (2000).

---

16. All persons . . . shall have the same right in every State . . . to make and enforce contracts. (This) includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship . . . the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

"Child support may be provided for in two separate manners: By court order and by contract." Agreement terms are not enforceable as contract terms unless the agreement so provides. *Hoffman v. Hoffman*, 805 S.W.2d 848, 851 (TX 1991).

"Recognizing the validity of appellant's contractual promise . . . serves rather than contravenes the compelling public policies of family law to . . . provide for their support, foster the best interests of the child, and promote familial responsibility." *Dunkin, supra.*

Parents by joint agreement have no power to control support determinations. *Wilson v. Whitney*, No. 23901 (Mo.App. S.D. 05/14/2002).

When the order establishing the amount of child support is based on an agreement between the parties, the decree should not be modified except for clear and sufficient reasons and after thorough consideration and investigation. *Ex Parte John Olyn Tabor, Jr*, No. 1010043 (Ala. 6/7/2002).

Arrearages don't accumulate when a child is with the paying parent, who is then paying the support directly, but only if the custodial parent has contractually agreed. *Matter of O'Conner v. Curcio*, 281 A.D.2d 100, 724 N.Y.S. 2d 171 (N.Y. App. Div. 2001).

Tuition costs by contract and court order do not count as support because they are not subject to modification. *Huntley v. Huntley*, No. E2000-01718-COA-R3-CV (Tenn.App. 6/14/ 2001).

"A contractual agreement between separated parents by which the non-custodial parent pays child support without the compulsion of a court order can be a preexisting reasonable child support obligation." *Lacy v. Arvin*, No. 1498 (Md. Sp. App., 9/10/2001).

"It is not a contract; and contract law has no place in the consideration of child support." *Sharpe, supra*, 213 (WY 1995).

This dichotomy was recently addressed in the same appeal, which reversed from "modifications by agreement without prior court approval substitute the self-determined interests of one or both of the parents over the court-determined best interests of the child" (opinion retracted after rehearing *en banc*), to "Indeed, under certain circumstances, the right to reach agreement regarding support is more extensive than the court's power to decree support absent an agreement." *Shoup v. Shoup*, 37 Va.App. 240, 251, 556 S.E.2d 783, 788 (2001). "(A trial court may not disregard) the parties' well-established and broad right to reach legally binding and enforceable agreements concerning the support of their children" *ibid*, 249-250, 788, and "it need not determine the precise presumptive amount of support." *ibid*, 251, 788.

Montana's Changed Circumstances and Unconscionable Terms tests in 40-4-208(2), MCA (Appendix G) protect all decreed parenting plans from unreasonable invalidation. This is a higher degree of protection than the "substantial material change in circumstances" tests found in other States.

"The changed circumstances may not be speculative, future or possible conditions." *Gall v. Gall*, 187 Mont. 17, 608 P.2d 496 (1980). Unconscionability is not considered until changed circumstances have been established. Conduct of the parties, being an enforcement issue, is not a criteria, only an egregious outcome mandated by the terms.

In the instant case, genuine changed circumstances were not shown other than that Debra renounced the arrangement. Appellate review looked for abuse of discretion. That review determined the test was not applicable because the Divorce

Decree did not incorporate a support provision, despite the fact that the Decree had found by clear and convincing evidence that the parenting agreement was conscionable, made reference to it, approved it and ordered it performed. The agreement detailed the support arrangements and facilitated future revision. Also, for decrees with provisions relating to support, 40-4-208(2), MCA does not contemplate an alternative.

Having disposed of the threshold test barring modification, the court affirmed that the "agreement does not provide support." This conclusion was possible only by ignoring Pat's spending directly on the children per court order, contractual obligation, moral imperative, and because he enjoyed it. It would have been irresponsible for him to ignore changed circumstances. The *guardian ad litem* found Pat's spending inappropriate and reported, "I do not think his voluntary assumption of debt should relieve him of his support obligation to his children."

This finding could proceed only from the application of discretion and presumption over evidence and reality.

Such rationale is now the rule in Montana. One father bought the mother a home, furnished it, paid her to stay home with their child, and set up a college fund. He received no credit. *In re Marriage Albinger*, 2002 MT 104 (5/16/2002). Another had his payments increased $5000/year due to unconscionability, despite the mother documenting only $1000/year in extra costs and earning $5000/year more. *In re Marriage Kummer*, 2002 MT 168 (7/26/2002).

This departs from earlier precedent. "The (child support) payment provision of the contract is integral to the agreement of the parties. The provision may not be chopped-up and modified . . . without destroying the contract itself." *Winters v. Winters*, 188 Mont. 43, 610 P.2d 1165 (1980). "The standard that would warrant a reopening of a judgement is a finding of

unconscionability . . . it is the duty of the district court to enforce contracts not to make new ones for the parties, however unwise the terms may appear." *In re Marriage of Woodford*, 254 Mont.501, 839 P.2d 574 (1992).

The instant case was driven by the statement, "Because it is the children, and not the parents, who are beneficiaries of child support decrees, the custody and support of children are never left to contract between the parties." *Widhalm* (*supra*, 101, 750). The word "left" can mean a child is not abandoned by the State to a contract. The Montana Supreme Court clarified for the instant case that "left" means such contracts are prohibited. "Left" in recent usage regards parental agreements as subject to court supervision (*United States v. Ballek*, 170 F.3d 871, II, para.6 (9th Cir. 1999)), which is not definitive either way.

Two weeks later, before rehearing was denied the instant case, precedent switched again.

> We will not parse out provisions from the Agreement. When interpreting an agreement, it must be examined as a whole. Section 28-3-202, MCA (the whole of a contract is to be taken together so as to give effect to every part if reasonably practicable). Here, the Agreement's entire approach to custody and visitation was one of flexibility.

In re Marriage Oehlke, 2002 MT 79 (4/26/2002, citable).

Montana precedent is therefore conflicted between contract rights and presumptive guidelines.[17] Since contracts may be prohibited only when completely pre-empted by statutory mechanisms, *Widhalm* may be in place to prevent 40-4-

17. Parents with an agreement were recently admonished that "it is not proper to alter custody based on how much child support will result." *In re Marriage of O'Moore*, 2002 MT 31 (2/28/2002).

204(3)(a), MCA from being statutory impairment of contract. But *Widhalm*, as providing guidance for 40-4-201(5), MCA (Appendix I), countermands that statute while purporting to fortify it, and forbids the very contract terms the statute enables.[18]

There is no rational basis to reject all contracts prospectively. That is not the least restrictive means of implementing public policy and preserving family values.

Montana compelled an alternative to a parenting duty Pat had been spontaneously providing under volition of parental empowerment. His children now consider him a vulnerable protector, ineffective provider, inferior role model and pretentious authority. Montana enabled alienation of their affections.

Selective prohibition of contract in Montana parenting plans and failure to scrutinize per 40-4-208(2)(b), MCA violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment (Appendix H).

Presumptive child support guidelines as applied in this case and similar cases nationwide, where the obligor parent is substantially involved in direct financial care of children but is not credited, is not Equal Protection. Failure to individualize families at any level of scrutiny is not Due Process.

The Constitution and federal law requires a just and appropriate support allocation in every case. The dilemma the States face is, when confronted by two opposing federal imperatives, which breaks the tie, the liberty rights of its parents and children, or the compelling needs of State treasuries?

---

18. To the extent the two statutes countermand each other, and because 40-4-208(2) is also implicated, the Montana Attorney General has been served in case he wishes to defend any of the statutes.

Recognition by this Court of the liberty interest of parents to support their children as both a duty and a right, and commentary on the qualified right of parents to contract the upbringing of their children, will enable the States to pursue five objectives:

1. Encourage obligor parents to remain committed in their children's lives.
2. Protect the interests of parents and children.
3. Encourage separated parents to fulfill their duties as cooperative parenting teams.
4. Improve reliability of payments needed to keep single-parent households off welfare.
5. Redirect enforcement focus to truly recalcitrant or irresponsible parents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK R. CAFFREY,
Petitioner, pro se
P.O. Box 341
Seeley Lake, MT 59868
(406) 677-2661

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF MONTANA DECIDED APRIL 11, 2002

IN THE SUPREME COURT OF THE STATE OF MONTANA
2002 MT 72N

No. 00-307

IN RE THE MARRIAGE OF PATRICK R. CAFFREY,

Petitioner and Appellant,

and

DEBRA A. CAFFREY,

Respondent and Respondent.

Submitted on briefs: December 7, 2000
Decided: April 11, 2002

Justice James C. Nelson delivered the Opinion of the Court.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent but shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

Appendix A

Patrick R. Caffrey (Patrick) appeals an order issued by the District Court for the Fourth Judicial District, Missoula County, modifying Patrick's monthly child support payment. We affirm.

Patrick raises the following issues on appeal:

1. Did the District Court err by modifying child support without finding substantial and continuing changed circumstances?

2. Should the District Court's order be reversed and the parties' agreement enforced for equitable reasons?

3. Is this Court's jurisprudence as set forth in *In re Marriage of Widhalm* and similar cases which hold that parents may never contract with each other regarding child support and child custody, inconsistent with United States Supreme Court jurisprudence and the Due Process Clause of the Fourteenth Amendment?

In addition, Debra requests that this Court award her damages pursuant to Rule 32, M.R.App.P., based upon Patrick's appeal of the District Court's order "without substantial or reasonable grounds."

Factual and Procedural Background

Patrick and Debra Caffrey (Debra) were married on August 4, 1983. In late 1991, Patrick and Debra decided to dissolve their marriage, thus they entered into mediation to resolve issues regarding property distribution, child custody

and child support. Consequently, Patrick and Debra signed a mediation agreement in February 1992 and, after five months of negotiations, they each signed the "Marital and Property Settlement Agreement" (the Agreement) on July 2, 1992.

On March 23, 1993, the District Court entered its Decree of Dissolution in this matter. At the time of dissolution, the parties' marital estate was valued in excess of $580,000. Properties received by Debra as an inheritance from her father seven years before the dissolution of the parties' marriage were included in the marital estate as Patrick's income and labor had been required to maintain those properties during the marriage.

Patrick works as a forest manager for Plum Creek in Seeley Lake and earns approximately $66,000 per year. Debra works as a special education teacher in Missoula and earns approximately $25,000 per year. Patrick and Debra have three children, a son who will be 18 years old in July 2002, and twin daughters who will be 16 years old in May 2002. The Agreement called for Debra to have primary physical custody of the children and for Patrick to surrender $25,000 of his interest in the marital home to Debra in lieu of child support.

Although the Agreement called for Patrick to claim the children as dependents on his income tax return, Debra claimed the children as dependents on her 1997 return asserting that she provided the majority of support for the children. Thereafter, Patrick petitioned the court to enforce the March 23, 1993 decree as it related to the tax exemptions and to modify the decree as it related to visitation and transportation of the children. The District Court appointed

a Guardian Ad Litem for the children to address the issues raised by Patrick's petition. The Guardian did not address the issue of child support.

In its November 9, 1998 order resolving the parenting issues, the District Court adopted the recommendations of the Guardian Ad Litem as to visitation, but did not make any determination as to the tax exemptions pending the resolution of Debra's Motion to Determine Child Support Obligation filed on May 14, 1998. The District Court appointed another Guardian Ad Litem for the purpose of calculating child support. This Guardian Ad Litem determined that the Agreement did not provide for the needs of the children, hence she recommended a modification of child support using the Montana Child Support Guidelines with a resulting payment from Patrick to Debra of either $605 per month or $1,022 per month, depending on whether the District Court found that a lopsided property distribution had occurred.

In its March 15, 2000 Order on Child Support, the District Court concluded that the Agreement did not provide for the support of the parties' children, thus a modification of child support was necessary. The court did not make any express findings regarding changed circumstances or unconscionability.

In its order, the court elected the higher figure recommended by the Guardian Ad Litem and ordered Patrick to pay Debra $1,022 per month in child support payments. The court also ordered that these payments be retroactive to the date of the court's November 1998 order. In addition, the District Court ordered that the tax exemptions for the children be attributed to Patrick.

Appendix A

Patrick appeals the District Court's March 15, 2000 order regarding child support.

Standard of Review

In cases involving modification of child support, we review a district court's findings of fact to determine whether they are clearly erroneous. *In re Marriage of Pearson*, 1998 MT 236, ¶ 29, 291 Mont. 101, ¶ 29, 965 P.2d 268, ¶ 29 (citing *In re Marriage of Widhalm* (1996), 279 Mont. 97, 100, 926 P.2d 748, 750). We review a district court's conclusions of law to determine whether the court's interpretation of the law was correct. *Pearson*, ¶ 29. And, we review a district court's overall decision on modification of child support for abuse of discretion keeping in mind the best interests of the children. *Pearson*, ¶ 29.

Issue 1.

Did the District Court err by modifying child support without finding substantial and continuing changed circumstances?

Patrick argues that the District Court erred in modifying child support in this case without first meeting the criteria established in § 40-4-208(2)(b), MCA. He contends that since the District Court did not make express findings that there had been substantial and continuing changed circumstances and that the Agreement was unconscionable, the court was without the authority to modify the Agreement regarding child support.

Patrick is correct that § 40-4-208(2)(b), MCA, sets forth the standard for district courts to follow when considering the propriety of modifying child support provisions in a dissolution decree. However, Patrick is incorrect in his interpretation of that statute as it applies to this case.

Section 40-4-208(2), MCA, provides in pertinent part as follows:

> (b) Except as provided in 40-4-251 through 40-4-258, *whenever the decree proposed for modification contains provisions relating to maintenance or support*, modification under subsection (1) may only be made:
>
> (i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable;
>
> (ii) upon written consent of the parties; or
>
> (iii) upon application by the department of public health and human services, whenever the department of public health and human services is providing services under Title IV-D of the federal Social Security Act. The support obligation must be modified, as appropriate, in accordance with the guidelines promulgated under 40-5-209. Except as provided in 40-4-251 through 40-4-258, a modification under this subsection may not be made within 12 months after the establishment of the order or the most recent modification. [Emphasis added.]

Appendix A

In the March 23, 1993 Decree of Dissolution, the District Court specifically decreed: "That the provisions of the Marital and Property Settlement Agreement executed between the parties is approved, but the Agreement is not part of the record in this matter, nor is it to be set forth as part of the court's decree." Consequently, since the parties' Marital and Property Settlement Agreement containing provisions relating to child support was not incorporated into the decree, the provisions of § 40-4-208(2)(b), MCA, are not applicable. In other words, it was not necessary for the District Court to find that there were "changed circumstances so substantial and continuing as to make the terms unconscionable" before the court could modify child support.

Similarly, the cases Patrick relies on in support of his argument regarding unconscionability (*In re Marriage of Jarussi*, 1998 MT 272, 291 Mont. 371, 968 P.2d 720; *In re Marriage of Pearson*, 1998 MT 236, 291 Mont. 101, 965 P.2d 268; *In re Marriage of Clyatt* (1994), 267 Mont. 119, 882 P.2d 503; and *In re Marriage of Barnard* (1994), 264 Mont. 103, 870 P.2d 91) are all distinguishable from the case *sub judice*. In each of those cases, the child support obligation was incorporated into the decree of dissolution, thus, pursuant to § 40-4-208(2)(b), MCA, the court had to find that there were "changed circumstances so substantial and continuing as to make the terms unconscionable" before the court could modify child support. As we have already noted, that is not the case here.

Accordingly, we hold that the District Court did not err by modifying child support without finding substantial and continuing changed circumstances.

Appendix A

Issue 2.

Should the District Court's order be reversed and the parties' agreement enforced for equitable reasons?

Patrick argues that the Agreement provides adequate support for the parties' three children and that it contains clauses that allow for consultation and appropriate adjustment. He contends that modifying the Agreement at this point would create an unconscionable result and that there has been no finding that the children's needs are not being met. Patrick also argues that his children enjoy an "exceptional" standard of living because he takes them on "adventure vacations" throughout the United States and to places like Bora Bora, Australia and the Caribbean.

Contrary to Patrick's contentions, the children's needs are not being met under the terms of the Agreement. Patrick claims he contributed a lump sum of $25,000 as support for the children at the time of dissolution and that further support is not really necessary even though he claims to have contributed more over the years. Nevertheless, $25,000 was not an adequate amount to provide for Patrick's share of the needs of the parties' three children until they reached the age of majority (which, in the case of the two younger children, was more than eleven years from the date of dissolution). In addition, because of continuing problems between Patrick and Debra, the clauses in the Agreement that "allow for consultation and appropriate adjustment" became unworkable and a determination by the District Court was necessary.

Furthermore, as Debra noted in her brief on appeal, while the District Court may not have found that the children are "underprivileged" or that Debra is "destitute as Patrick would have the court require," it did determine that the children's needs were not being met on Debra's salary alone without the contribution of their father, and further determined that the children's best interests would be better met if Patrick began contributing to their support. Patrick's taking the children to exotic parts of the globe does not operate to put food in the children's mouths or clothes on their backs. The District Court correctly determined that Patrick's expenditures on vacations with the children do not relieve him of an actual child support contribution towards their daily needs.

This Court has repeatedly held that a district court must consider the Uniform Child Support Guidelines and the statutory criteria set forth at § 40-4-204, MCA, when it makes its child support determination. *In re Marriage of Cowan* (1996), 279 Mont. 491, 497-98, 928 P.2d 214, 218 (citations omitted). Section 40-4-204(3)(a), MCA, provides in pertinent part:

> Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209. *The guidelines must be used in all cases, including cases in which . . . the parties have entered into an agreement regarding the support amount.* [Emphasis added.]

Here, the Guardian Ad Litem made a recommendation based upon the Uniform Child Support Guidelines. The District Court determined that Patrick was not providing for the care and support of his children according to his respective abilities, thus the court properly adopted the guardian's recommendation and ordered Patrick to pay $1,022 each month as support for the children.

Accordingly, finding no abuse of discretion in the District Court's determination, we affirm the court's award of child support.

Issue 3.

Is this Court's jurisprudence as set forth in In re Marriage of Widhalm and similar cases which hold that parents may never contract with each other regarding child support and child custody, inconsistent with United States Supreme Court jurisprudence and the Due Process Clause of the Fourteenth Amendment?

In its March 15, 2000 Order on Child Support, the District Court cited to *In re Marriage of Widhalm* (1996), 279 Mont. 97, 926 P.2d 748, in support of its conclusion that since the Agreement did not provide support for the parties' children it would be in the best interests of the children to modify any support arrangement. In *Widhalm*, this Court determined that issues of custody and support of children are never left to contract between the parties because it is the children and not the parents who are the beneficiaries of child support decrees. *Widhalm*, 279 Mont. at 101, 926 P.2d at 750 (citations omitted).

Appendix A

Patrick objects to the District Court's determination arguing that this Court's long standing jurisprudence that District Courts are not bound by contracts concerning child support and child custody should only apply in cases where it has been established that the State has a compelling interest, superior to that of the parents, in the children at issue. He maintains that since this Court has not identified any threshold requirement, such as a finding of abuse or neglect that would trigger such an imposition on a parent's right to raise his or her children, the holdings in *Widhalm* and similar cases are blatantly unconstitutional and in direct conflict with United States Supreme Court jurisprudence such as *Troxel v. Granville* (2000), 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49.

However, contrary to Patrick's contentions, *Troxel* is distinguishable from this case because *Troxel* dealt with a parent's rights regarding care, custody and control of children and not with child support obligations. In *Troxel*, paternal grandparents petitioned for increased visitation with their deceased son's children. While the children's mother did not deny the grandparents visitation, she believed that the extent of the visitation the grandparents were requesting was not in the children's best interests. The Supreme Court held in *Troxel* that a Washington state statute providing that any person may petition the courts for visitation at anytime and that the courts may order visitation rights for any person when visitation may serve the best interests of the child violated the substantive due process rights of the mother to make decisions concerning the care, custody and control of her children. *Troxel*, 530 U.S. at 75, 120 S.Ct. at 2065.

Patrick also relies on this Court's decision in *In re E.A.T.*, 1999 MT 281, 296 Mont. 535, 989 P.2d 860, for the proposition that parents have a fundamental liberty interest in raising their children and that the associated rights must be protected by fair procedures. Once again, *E.A.T.* dealt with a parent's rights regarding care, custody and control of children and not with child support obligations. *E.A.T.* involved the termination of a mother's rights because she continually failed to protect her child from sexual abuse by the child's father. While Patrick is correct that parents have a fundamental liberty interest in parenting their children, in the absence of proper care or support, a parent's wishes may be overridden by the State's compelling interest in protecting the best interests of the children.

In this case, Patrick's fundamental liberty interests in parenting his children have not been jeopardized. Only his decision to withhold child support for his children's needs have been affected by the District Court's decision.

Accordingly, we hold that this Court's jurisprudence as set forth in *Widhalm* and similar cases which hold that parents may never contract with each other regarding child support and child custody, is consistent with United States Supreme Court jurisprudence and the Due Process Clause of the Fourteenth Amendment.

Appendix A

Damages

Debra requests that we award her damages pursuant to Rule 32, M.R.App.P., based upon Patrick's appeal of the District Court's order "without substantial or reasonable grounds." As a general rule, this Court will not impose sanctions pursuant to Rule 32, M.R.App.P., unless the appeal is entirely unfounded and intended to cause delay or unless counsel's actions otherwise constitute an abuse of the judicial system. *In re Marriage of Moss*, 1999 MT 62, ¶ 41, 293 Mont. 500, ¶ 41, 977 P.2d 322, ¶ 41 (citations omitted). Although we did not rule in Patrick's favor nor grant him the relief he requested, the issues he raised had merit and were not unreasonable. Therefore, we deny Debra's request for damages pursuant to Rule 32, M.R.App.P.

Affirmed.

/S/ JAMES C. NELSON

We Concur:
/S/ KARLA M. GRAY
/S/ JIM REGNIER
/S/ TERRY N. TRIEWEILER
/S/ W. WILLIAM LEAPHART
/S/ JOHN W. WHELAN
District Judge John W. Whelan sitting for Justice James A. Rice
/S/ MIKE SALVAGNI
District Judge A. Michael Salvagni sitting for Justice Patricia O. Cotter

APPENDIX B — ORDER OF THE MONTANA FOURTH JUDICIAL DISTRICT COURT FOR MISSOULA COUNTY FILED MARCH 15, 2000

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

John W. Larson, District Judge
Fourth Judicial District Dept. 3
Missoula County Courthouse
Missoula, MT 59802
(406) 523-4773

Dept. 3
Cause No. DR-93-77567/83

IN RE THE MARRIAGE OF PATRICK R. CAFFREY,

Petitioner,

and

DEBRA A. CAFFREY,

Respondent.

ORDER ON CHILD SUPPORT

Pending before the Court is a child support controversy which arose out of an earlier dispute between the parties concerning parenting. That dispute was resolved by Order dated November 9, 1998. In that same Order the Court joined the Child Support Enforcement Division (CSED) in an effort to coordinate and economize upon judicial and administrative

time concerning the child support controversy drawn out of the parties Decree of Dissolution dated March 23, 1993. Subsequent to that Order CSED has indicated that it will defer to this Court for the determination of child support issues and Respondent has agreed. The parties then filed child support worksheets, this Court subsequently appointed Guardian Ad Litem Heather Latino, Esq., for purposes of calculating child support, who submitted her report on December 9, 1999. That report recommended the child support payment to Respondent Debra A. Caffrey from Petitioner Patrick R. Caffrey in the amount of $1,022.00 per month. This Court concludes, in the best interests of the children, that the Marital and Property Settlement Agreement did not provide support of the three children of the marriage, and, accordingly, a modification of the original child support Order is necessary. *In Re the Marriage of Widhalm*, 279 Mont. 97, 100, 926 P.2d 748, 750 (1996). Therefore,

IT IS HEREBY ORDERED that the Court hereto adopts and attaches the Guardian Ad Litem's Exhibit "F" as its child support calculations and orders Petitioner Patrick R. Caffrey to pay Respondent Debra A. Caffrey the amount of $1, 022.00 per month in child support payments.

The Court further, adopts the explanatory notes of the Guardian Ad Litem set forth below:

1. Income is not imputed to Debra who is employed in a full-time position as a special education teacher. Debra's income is calculated based on her pay stubs which reflect that she will make $25,242 in 1999.

Appendix B

2. Patrick's income is taken directly from his financial affidavits.

3. Debra's required employment expenses were reduced to reflect the amount she is required to pay for union dues and for continuing education courses required to maintain her teaching certificate.

4. Patrick is credited for his payment of the children's health insurance premiums. Debra does not receive any credit for health insurance premium costs as she is not required, nor does it appear necessary, to provide the children with duplicate coverage.

5. Neither parent receives any credit for extraordinary medical expenses. The only medical expenses incurred by either parent have been for physicals, eyeglasses, contacts, and minor surgery which are not extraordinary medical expenses. See generally *Welch v. Welch*, 273 Mont. 497, 905 P.2d 132 (1995), and *In re Marriage of Weed*, 254 Mont. 162, 836 P.2d 591 (1992).

6. Patrick incurs substantial costs in transporting the children so that he may spend parenting time and travel with them. The adjustment to his income was calculated based on the information provided in his financial affidavit and in prior pleadings to this Court. In March of 1999, Pat stated that he travels 6,000 miles per year while transporting his children in addition to another 1,000 miles via other means. The information provided by the parties does not indicate any change in circumstances which would have increased this mileage by 2,000 miles during the past nine months. Patrick

is credited for $1,500 in airfare costs according to the information provided in his most recent financial affidavit.

7. Patrick currently makes regular payments into the children's savings accounts, whole life insurance policies and bonds for the children's college education in the amount of $3,900 annually. Such payments, so long as they continue, should be factored into the child support calculations. However, if Pat ceases to make any of the above expenditures toward the children's education he should no longer be permitted to receive this adjustment to his income.

8. Child support would be calculated at $14,055 a year or $1,171 a month if neither of the above adjustments/ variances to Patrick's income were incorporated in the calculations. (See Exhibit "G" to Guardian Ad Litem's Report).

9. The tax exemptions for the children are attributed to Patrick.

The Court determines that this child support will be retroactive to the date of its November 1998 Order referenced above.

DATED this 14th day of March, 2000.

s/ John W. Larson
JOHN W. LARSON, District Judge

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF MONTANA DENYING PETITION FOR REHEARING DATED MAY 16, 2002

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 00-307

IN RE THE MARRIAGE OF PATRICK R. CAFFREY,

Petitioner and Appellant,

and

DEBRA A. CAFFREY,

Respondent and Respondent.

ORDER

IT IS ORDERED that the Petition for Rehearing filed with this Court by Petitioner and Appellant, Patrick R. Caffrey is DENIED.

DATED this 16th day of May, 2002.

s/ Karla M. Gray
Chief Justice

s/ James Nelson

s/ Jim Regnier

s/ W. William Leaphart

s/ Terry Trieweiler
Justices

APPENDIX D — TITLE 42 — THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 — SOCIAL SECURITY
SUBCHAPTER IV — GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES
Part D — Child Support and Establishment of Paternity

42 USC Sec. 667

Sec. 667. State guidelines for child support awards (portions omitted)

(a) Establishment of guidelines; method Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

> (1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.
>
> (2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the

award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies.

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

APPENDIX E — TITLE 45 — PUBLIC WELFARE
CHAPTER III — OFFICE OF CHILD SUPPORT ENFORCEMENT
PART 302 — STATE PLAN REQUIREMENTS — TABLE OF CONTENTS

45 CFR 302.56

Sec. 302.56 Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the noncustodial parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

Appendix E

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze

case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

APPENDIX F — MCA. CHILD SUPPORT

40-4-204

40-4-204, MCA. Child support (portions omitted)

(3) (a) Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and human services pursuant to *40-5-209*. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the parties have entered into an agreement regarding the support amount. A verified representation of the defaulting parent's income, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or that it is inappropriate in that particular case.

(b) If the court finds that the guideline amount is unjust or inappropriate in a particular case, it shall state its reasons for that finding. Similar reasons must also be stated in a case in which the parties have agreed to a support amount that varies from the guideline amount. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(c) If the court does not order a parent owing a duty of support to a child to pay any amount for the child's support, the court shall state its reasons for not ordering child support.

APPENDIX G — MCA. CHILD SUPPORT

40-4-208

40-4-208, MCA. Modification and termination of provisions for maintenance, support, and property disposition. (portions omitted)

(2)(a) Except as provided in *40-4-251* through *40-4-258*, whenever the decree proposed for modification does not contain provisions relating to maintenance or support, modification under subsection (1) may only be made within 2 years of the date of the decree.

(b) Except as provided in *40-4-251* through *40-4-258*, whenever the decree proposed for modification contains provisions relating to maintenance or support, modification under subsection (1) may only be made:

(i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable;

(ii) upon written consent of the parties; or

(iii) upon application by the department of public health and human services, whenever the department of public health and human services is providing services under Title IV-D of the federal Social Security Act. The support obligation must be modified, as appropriate, in accordance with the guidelines promulgated under *40-5-209*. Except as provided in *40-4-251* through *40-4-258*, a modification under this subsection may not be made within 12 months after the establishment of the order or the most recent modification.

APPENDIX H — CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 10, Clause 1.

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I — MCA. SEPARATION AGREEMENT

40-4-201. Separation agreement.

(1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, parenting, and parental contact with their children. In cases in which children are involved, the separation agreement may contain a parenting plan as required in *40-4-234*.

(2) Subject to subsection (7), in proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, it may request that the parties submit a revised separation agreement or it may make orders for the disposition of property, maintenance, and support.

(4) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance and not unsatisfactory as to support:

(a) unless the separation agreement provides to the contrary, its terms must be set forth in the decree of dissolution or legal separation and the parties ordered to perform them; or

(b) if the separation agreement provides that its terms may not be set forth in that decree, the decree must identify the separation agreement and state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except as provided in subsection (7) and except for terms concerning the support, parenting, or parental contact with the children, the decree may expressly preclude or limit modification of terms set forth in the decree if provided for in the separation agreement. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

(7) The decree may be modified, as provided in *40-4-251*, through *40-4-258*, for failure to disclose assets and liabilities.